TITAN POLYETHYLENE (MALAYSIA) SDN BHD

v.

ASTRA PLASTIC INDUSTRIES SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-135-2000]
8 FEBRUARY 2001

CIVIL PROCEDURE: *Summary judgment - Setting aside - "Showing cause by affidavit or otherwise" - Order 14 r. 4(1) Rules of the High Court 1980 - Meaning and purport - Defendant seeking to resist application by relying on statement of defence and counterclaim - Whether allowable - Failure to file affidavit in opposition - Whether inconsequential - Rules of the High Court 1980, O. 14 r. 4(1)*

CIVIL PROCEDURE: *Summary judgment - Counterclaim - Stay of execution - Stay of execution pending disposal of counterclaim - Whether counterclaim a "plausible counterclaim" - Triable issues - Whether issues raised triable issues - Rules of the High Court 1980, O. 14*

The plaintiff had applied for summary judgment under O. 14 Rules of the High Court 1980 ('RHC') in respect of a claim for goods sold and delivered. In support of the application, the plaintiff filed an affidavit exhibiting the relevant sales confirmation, invoices and delivery orders. The plaintiff also exhibited the joint and several guarantee which the second and third defendants executed in its favour. The defendants did not file any affidavit in opposition. Instead, to resist the plaintiff's application, the defendants relied on their statement of defence and counterclaim, in which they pleaded that they had made payment through letters of credit which the plaintiff had accepted. This apart the defendants also tendered a written submission in which they exhibited certain supporting documents. The learned Senior Assistant Registrar ruled that the documents as exhibited by the defendants had raised triable issues, and in the circumstances disallowed the plaintiff's application. The plaintiff appealed whereupon the following issues arose for the determination of the court, namely: (i) whether the failure to file affidavit in opposition herein was fatal to the defendants' case; (ii) whether it was open to the defendants to adduce documents as exhibits through a written submission; (iii) whether the defendants had raised triable issues, and if not (iv) whether the defendants were entitled to a stay of execution pending the final disposal of the counterclaim against the plaintiff.

Held:

[1] The express wording of O. 14 r. (4)(1) RHC has given the defendants the option of showing cause through affidavit evidence or otherwise. The term "otherwise" must invariably include the showing of cause through the defence filed. It follows that the failure to file an affidavit in opposition does not preclude the court from considering the defence as a mode of opposition to the plaintiff's application. (p 771 d-e)

[2] Whilst the defendants could opt to resist an O. 14 application by way of a defence, the option did not entitle them to exhibit documents in support of their defence through annexures in a written submission. Under O. 14 r. 4 RHC, the modes of adducing documents were twofold, namely: (i) as exhibits where the defendants had filed an affidavit; and (ii) by way of production or examination where the court has ordered the production or examination on oath of the documents. Clearly, exhibits tendered must comply strictly with the express wordings of this rule. (p 771 f-g)

[2a] The exhibits in the written submission were not adduced in strict compliance with the rules of procedure. The defendants could not therefore refer to the same in support of their defence. Consequently, the court must ignore and disregard the same. (p 771 i)

[3] The defendants' plea that they had paid the plaintiff through letters of credit as replacement of cash payment did not condescend on particulars. The averment was thus a bald averment and cannot be portrayed as a triable issue. For the same reason, the averment on acceptance of letters of credit payment and acknowledgment of such mode of payment by the plaintiff did not and could not amount to a triable issue. Likewise, the allegations of breach of contract, at the most, were mere issues, and not triable issues meriting a full trial. (p 772 d-e)

[4] The plaintiff had exhibited the joint and several guarantee executed by the second and third defendants. There was no denial by the second and third defendants of their execution of the guarantee and of the express wording of the terms of the guarantee, in particular cls. 1, 3 and 16 thereof. On the facts, the liability of the second and third defendants had been adequately proved such as to entitle the plaintiff to summary judgment. (p 774 b-c)

[5] There was no breach of contract on the part of the plaintiff. Since the defendants' counterclaim for damages was based on such alleged breach, the defendants could not be said to have advanced a "plausible

counterclaim". There being no plausible counterclaim, the defendants were not entitled to a stay of execution pending the final disposal of the counterclaim. (pp 773 h-i & 774 h)

[Summary judgment granted to plaintiff.]

Case(s) referred to:

Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn Bhd [1974] 2 MLJ 94 ***(refd)***

Bank of British Columbia v. Anglo American Cedar Products [1985] 57 BCLR 350 ***(refd)***

Cow v. Casey [1949] 1 KB 478 ***(refd)***

Grissco Sdn Bhd v. Blackgold Sdn Bhd [1988] 2 MLJ 397 ***(refd)***

John Wallingford v. The Directors of the Mutual Society [1880] 5 AC 685 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(refd)***

Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1994] 4 CLJ 757 ***(refd)***

Societe Des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 ***(refd)***

Syn Lee & Co v. Bank of China [1961] MLJ 87 ***(refd)***

Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 ***(refd)***

Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 4(1)

For the plaintiff - Adi Radlan; M/s Adi Radlan & Co
For the defendant - KN Fan; M/s Richard Tee & Co

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:

By encl. 32 the plaintiff herein appealed against the decision of the senior assistant registrar given on 15 May 2000 dismissing the plaintiff's application for summary judgment pursuant to O. 14 Rules of the High Court 1980.

The plaintiff's application for summary judgment is based on the averments deposed in the supporting affidavit of the plaintiffs credit manager one Farid bin Yusof in encl. 6.

In the supporting affidavit in encl. 6 it can be discerned that the plaintiff's claim against the 1st defendant is based on unpaid invoices and interest thereon for goods sold and delivered at the 1st defendant's request and as against the 2nd and 3rd defendants as guarantors based on a written joint and several guarantee dated 5 September 1995.

The defendants have not filed any affidavit in reply to encl. 6 but has filed a statement of defence and counterclaim in encl. 9 and are relying solely on encl. 9 in resisting the plaintiff's application for summary judgment.

Upon perusing the cause papers and affidavits filed herein the following undeniable facts appear:

1. The first defendant is the plaintiff's customer.
2. The plaintiff is the first defendant's supplier.
3. There exists a history of business relationship between the plaintiff and the first defendant.
4. The first defendant has received all invoices sent out by the plaintiff.
5. There have not been any objections in writing from the defendants.
6. The 2nd and 3rd defendants are directors of the 1st defendant.

The plaintiff's appeal in encl. 32 came up for hearing before me on 8 February 2001 and Encik Adi Radlan appeared for plaintiff. Appearing for the defendants was Mr KN Fan who informed the court that he was only mentioning the case on behalf of the defendant's counsel from Kuala Lumpur and applied for a postponement on the ground that the defendant's counsel had on 22 January 2001 written to YAA Hakim Besar Malaya for transfer of the proceedings to the Kuala Lumpur High Court.

I enquired from Mr Fan as to the reasons why the defendants are making the application for transfer at this late juncture bearing in mind that I had on 10 November 2000 set aside the earlier order dated 15 August 2000 allowing the transfer of the case to the Kuala Lumpur High Court and also enquired whether he was prepared to proceed with the hearing of the appeal in encl. 32.

In reply to the aforesaid queries raised by the court, Mr Fan informed the court that he is unable to enlighten the court as to reason behind the application for transfer being made at this late stage and that he has no instructions to proceed in resisting the plaintiff's appeal and again requested for an adjournment.

The plaintiff's counsel streneously objected to the Mr Fan's request for adjournment on the grounds that defendant's counsel in Kuala Lumpur has not only a persistent history of not appearing personally to resist the plaintiff's application for summary judgment but has also in the past requested for adjournments. I had no hesitation in the absence of a reasonable explanation by Mr Fan, in refusing his request for adjournment and accordingly ordered that the hearing of encl. 32 be proceeded upon.

I would like to stress that counsel who have agreed to take up briefs and act for their clients is under a duty to be present in court to pursue the authority conferred upon them by virtue of the solicitor-client relationship established. Counsel's duty to his clients is to ensure that he is present in court whenever he is called upon to appear by the court. Counsel who fails to appear in court on the date fixed for hearing or for that matter for mention does so at his own peril and to the detriment of his client. As officers of the court they owe an obligation to be ready, willing and able to prosecute their client's claim or defence (as the case may be) and must never be presumptious of an optimistic result in respect of their application.

The risk of not being able willing and ready to proceed is highly detrimental and the counsel and their clients has to bear all attendant consequences.

On this score alone in the light of the failure by the defendant's counsel to present rebuttal submission I could have allowed the plaintiff's appeal but to ensure that the ends of justice is served I proceeded to hear the submission of plaintiff's counsel and embarked upon a scrutiny of all the relevant documents filed in ascertaining whether or not that the plaintiffs have sufficiently made out a case for summary judgment.

Before delving into the available evidence herein I am minded that summary judgment application under O. 14 is a summary judgment procedure and not a summary procedure – *Bank of British Columbia v. Anglo American Cedar Products* [1985] 57 BCLR 350. Order 14 application is not a case of bringing the issues on affidavit evidence but is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed – *Syn Lee & Co v. Bank of China* [1961] MLJ 87.

Though it is trite law that a conflict of evidence ought not to be disposed off on affidavit evidence only it is also trite law that the affidavit evidence must not be uncritically accepted. The affidavit evidence would have to be examined in detail to see "if there is a fair or reasonable probability of the defendant having a real or *bona fide* defence." The whole of the evidence has to be looked at, even if it involves minute examination of documents and facts, if by such exercise the court can come to a conclusion that there is no fair or reasonable probability of the defendant having a real or *bona fide* defence – *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617. Order 14 is intended to put an end to sham defences concocted for the sole purpose of delay and consequently causing great loss to the plaintiff' who is endeavouring to enforce its rights under the law – *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1994] 4 CLJ 757.

It is not enough for the respondent in answer to the appellants application to sign final judgment to raise an issue, or any issue. He must however raise such issue as would require a trial in order to determine it. In other words the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene MR in *Cow v. Casey* [1949] 1 KB 478 at p. 481 "when the point is understood and the court is satisfied that it is really unarguable the appellants should be entitled to what they prayed for in the summons-in-chambers" – *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241.

Where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14 – *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183.

With the above principles in the forefront of my mind I shall now address the various issues raised as discerned from the cause papers, the affidavits and the written submission filed by the parties in the earlier hearing of the application for summary judgment before the senior assistant registrar.

The plaintiffs in support of their claim have exhibited the sales confirmation (exh. "FY1") and invoices and delivery orders (exh. "FY2") in encl. 6. They have also exhibited as exh. "FY3" the joint and several guarantee dated 5 September 1995 executed by the 2nd and 3rd defendants.

The defendants for reasons best known to them did not file an affidavit in opposition to resist the plaintiff's application but instead relied upon their statement of defence and counterclaim in encl. 9. The defendants further in their endeavour to portray a triable issue attempted to tender several documents to wit applications for documentary credit as exhibits *via* their written submission dated 8 August 2000 in support of their defence of replacement of the payment by way of letters by credit instead of cash and the contention of full settlement of the claim by the replaced mode of payment by letters of credit.

The question arises whether a defendant in resisting an O. 14 application is entitled to tender documents as exhibits through written submission and the determination of same would invariably involve an appraisal of O. 14 r. 4 RHC which is reproduced hereunder:

> (1) A defendant may show cause against an application under r. 1 by affidavit or otherwise to the satisfaction of the court.
>
> (2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.

(3) The court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(4) On the hearing of such an application the court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity:

(a) to produce any document;

(b) if it appears to the court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath.

The express wording of sub-r. (1) of r. 4 thereof clearly enables the defendant the option of showing cause through affidavit evidence or otherwise and the term "otherwise" invariably includes the showing of cause through the defence filed – *Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn Bhd* [1974] 2 MLJ 94. In essence the failure to file an affidavit in opposition does not preclude the court from considering the defence as a mode of opposition to the plaintiff's application - *Grissco Sdn Bhd v. Blackgold Sdn Bhd* [1988] 2 MLJ 397 at 399 per Tan Chiaw Chong J.

Since the defendants are not precluded from showing cause by reference to their statement of defence and counterclaim in encl. 9 the question arises whether they are entitled to exhibit documents in support of their defence in the manner adopted by the defendants, namely through their written submissions. I must answer the question with an emphatic No! The option to show cause through the defence in resisting an O. 14 application does not enable the defendants to exhibit documents in support of the defence – through exhibits or annextures in the written submission. Under O. 14 r. 4 the modes of adducing documents is twofold, namely where the defendants files an affidavit the documents are exhibited as exhibits, and where the court orders production or examination on oath the documents could be produced through such production and examination. It should be observed and emphasised that the rules of procedure cannot be ignored and disregarded and any exhibits to be tendered or adduced must comply strictly with the express wording of the rules.

As the exhibits were not adduced in strict compliance with the rules of procedure the defendants cannot refer to same in support of their defence. The defendants are the masters of their own folly which invariably warrants this court to totally ignore and disregard the exhibits annexed to their written submission.

I shall now advert to the three issues raised by the defendants in their defence to ascertain whether the issues raised are triable issues entitling the defendants to litigate on the matter by way of full trial.

First issue – whether defendants have made payments through letters of credit and plaintiffs acceptance of this mode of payment in replacement of cash payment

In support of the aforesaid issue which was raised in paras. 4 and 5 of its statement of defence the plaintiff purports to exhibit two copies of "documentary credit application" to Bank of Commerce (M) Bhd through its written submission and contends that by reason thereof the plaintiff is suppressing documents and deliberately omitting to disclose relevant facts and accordingly affects the plaintiff's credibility as it casts doubts on the truthfulness of the averments made by plaintiff in encl. 6.

I have carefully perused the contention as raised in paras. 4 and 5 of the defence aforesaid and note that the averment does not condescend on particulars. No particulars of the purported letters of credit and its acceptance by plaintiff as replacement was listed by the defendants in their defence and as I have ruled that the defendants cannot adduce the documentary credit application to Bank of Commerce (M) Bhd through the written submission, the averments remains a bald averment and as such cannot be portrayed by the defendants as a triable issue. Lord Blackburn on the requirement of particulars, observed in *John Wallingford v. The Directors of the Mutual Society* [1880] 5 AC 685:

> I think that when affidavits are brought forward to raise defence, they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless if it was true, that you owed the man nothing, as you swear that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so. So again, if you swear that there was fraud that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.

I would also like to emphasise that even if I were to consider the documentary credit application as adduced through the written submissions, they are at best applications for letters of credit and there is no evidence to show that it was issued nor payment made or accepted by the plaintiff. As such the contentions of a triable issue as averred in paras. 4 and 5 of the statement of defence cannot be acceded to and accepted by me as a triable issue meriting a full trial.

Issue of interest on overdue accounts at 1.5% per month.

The defendant's averment to this issue is found in para. 5 of their statement of defence. In essence what the defendant's contends is that by reason of the plaintiff's acknowledgment of the validity of the mode of payment by way of letters of credit as replacement to cash payments there is no debt owing by the defendants and hence no interest payment liability arises.

Based on my earlier reasoning of devoid of particulars the averment of acceptance of letters of credit payment in replacement of cash payment and acknowledgment of validity of such mode of payment does not and cannot amount to a triable issue. Since the mode of payment and acceptance of and validity thereof does not amount to a triable issue it follows that the averment of payment of interest liability becomes a non-issue. It is also pertinent to note that in cl. 5 of the sales confirmation exhibited as "FY1" in plaintiff's affidavit in encl. 6 it is expressly stipulated that "where the purchaser defaults in payment of the price in accordance with the payment term overleaf, Titan (ie, the plaintiff herein) shall be entitled to claim interest on the amount outstanding at the rate of 1.5% per month from the due date of payment till satisfaction thereof (emphasis added). Hence evidence of the contractual liability of interest on overdue accounts and the percentage thereof has been amply established by the plaintiff.

Third issue – breach of contract by plaintiff.

The defendants averment to this issue is found in para. 8 of the statement of defence. The allegation of breach of contract relates to the plaintiff failure to supply goods of merchantable quality and fit for defendants purpose which gave rise to complaints from defendant's purchasers. To support their averment they purport to exhibit two letters dated 4 January 2000 and 14 February 2000 from JMP Holdings Ptd Ltd through their written submission which exhibits for the reasons abovestated I have ruled that it cannot be considered by this court. I would like to emphasise that even if I were to take into consideration the two letters, at most they are issues but issues alone are insufficient – they must amount to triable issues before the defendants can be accorded an opportunity to have their day in court. The purported complaint letters was served three months after the dates of the plaintiff's invoices and delivery orders (ie, 12 August 1999 to 30 September 1999) and the contents of the two letters is clearly wanting in showing that the "hand stretch film" was fashioned out of the goods supplied by the plaintiffs to the defendants and/or that the plaintiffs is the only supplier to the first defendant. Hence it is my finding that the defendant's contention on breach of contract is not a triable issue meriting a full trial.

As regards the 2nd and 3rd defendants defence on their liability as guarantors the defence is one of bald denial and putting the plaintiff to strict proof – para. 6 of the defence.

The plaintiffs in accepting the defendants challenge to strictly prove their liability has exhibited the joint and several guarantee of the 2nd and 3rd defendants dated 5 September 1995. There was no denial by the defendants of their execution of the guarantee and the express wording of the terms of the guarantee and in particular to cls. 1, 3 and 16 thereof the liability of the 2nd and 3rd defendants have been adequately proven by the plaintiffs to entitle them to summary judgment and I so hold.

By reason of my finding that all the issues raised are not triable issues the plaintiffs have made out a case for summary judgment on their claim and I accordingly allowed the plaintiff's appeal in encl. 32 with costs.

The only question left is whether in the light of the counterclaim I ought to order a stay on the judgment herein granted to the plaintiffs pending the disposal of the counterclaim.

The counterclaim of the defendants is for damages for breach of contract for failure to provide goods of merchantable quality and fit for its purpose and damages for loss of reputation and business.

In this connection it is important not to lose perspective of the sage words of Abdoolcader J (as he then was) in *Societe Des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 wherein at p. 269 he stated:

> ... Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant set up a plausible counterclaim for an amount not less than the Plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim.

The operative words are "plausible counterclaim" – is the counterclaim herein and formulated as damage claims for breach of contract and loss of reputation and business "plausible" so as to entitle the defendants to a stay of execution until final disposal of the counterclaim. I think not. The reason is obvious – from the facts herein I have found that there is no breach of contract on the part of the plaintiffs and since defendant's counterclaim for damages is based as such the implausibility of the counterclaim speaks for itself.

Accordingly in the interest of justice the plaintiff ought not to be deprived of the fruits of its judgment by the ignominy of waiting for the disposal of the counterclaim and hence I order that there be no stay of the judgment herein.